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No. 94-906

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN RICHARDS, as Conservator and Guardian of LEONARD RICHARDS,

*Petitioner,*

v.

MICHELIN TIRE CORPORATION,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1.

Whether the Court of Appeals for the Eleventh Circuit committed reversible error in holding that the trial evidence was insufficient on the petitioner's claim of design defect?

2.

Whether the Court of Appeals for the Eleventh Circuit committed reversible error in holding that the trial evidence was insufficient to establish the intentional, malicious, or wanton misconduct on the part of Michelin Tire Corporation necessary to sustain an award of punitive damages?

## PARTIES

The petitioner is John Richards, as conservator and guardian of Leonard Richards.

The respondent is Michelin Tire Corporation. The Compagnie Generale Des Etablissements Michelin is the only entity related to Michelin Tire Corporation with publicly-traded shares. The shares are traded only on the Paris stock exchange and are nonvoting.

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## OPINION BELOW

The decision of the Court of Appeals for the Eleventh Circuit is reported at 21 F.3d 1048 (11th Cir. 1994). The Court of Appeals' denial of Mr. John Richards' application for en banc review is not reported to date but is reprinted in the petitioner's appendix at 25a-26a. The judgment of the United States District Court for the Southern District of Alabama and its denial of Michelin Tire Corporation's post-judgment motions for new trial and judgment as a matter of law are not reported, but are reprinted in the petitioner's appendix at 27a-30a.

## GROUNDS FOR JURISDICTION

Jurisdiction to consider the Petition exists under 28 U.S.C.A. § 1254(1) (1993).

## STATUTES AND REGULATIONS INVOLVED

The detailed federal regulation with which the Michelin tire at issue complied is 49 C.F.R. § 571.119 (October 1, 1985 edition) ("Federal Motor Vehicle Safety Standard 119" or "Standard 119"). This lengthy regulation is set forth in the Appendix to this response.

## STATEMENT OF THE CASE

### I. Course of Proceedings Below

The petitioner filed this products liability action in the Circuit Court of Mobile County, Alabama, on September 22, 1988 against The Budd Company ("Budd"), and the Michelin Tire Corporation ("Michelin"). [R. Vol. 1, Tab 1] On December 16, 1988, the case was removed pursuant to 28 U.S.C. §1441(a) to the United States District Court for the Southern District of Alabama. [R. Vol. 1, Tabs 2-3] The Ford Motor Company ("Ford") was thereafter added as an addi-

tional defendant. [R. Vol. 1, Tabs 33-34, Vol. 2, Tab 35]

Ford and Budd settled with the petitioner for $1,000,000 each, or a total of $2,000,000. The case against Michelin was tried before a jury from February 4-14, 1992. The jury returned a verdict against Michelin in the amount of $161,475.00 in compensatory damages and $5,000,000.00 in punitive damages. [R. Vol. 6, Tab 218] After a set-off of the amounts paid in settlement, judgment was entered against Michelin in the amount of $3,161,475.00 on March 12, 1992. [R. Vol. 6, Tabs 221-22, 224-26] Michelin's post-trial motions were summarily denied. [R. Vol. 6, Tabs 227-29, 236, 240]

The Court of Appeals for the Eleventh Circuit reversed the district court's judgment and directed that judgment be entered in Michelin's favor on the petitioner's claim for punitive damages and claim for compensatory damages based on the design defect and wantonness counts. The Eleventh Circuit remanded the case for a new trial on the sole remaining claim for compensatory damages based on allegedly negligent failure to warn. *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994).

## II. The Trial Evidence

This is a case of undisputed misuse of a Michelin tire. Because Mr. Leonard Richards was attempting to mount the tire in a manner violating virtually every important rule of tire mounting, the tire ruptured, causing severe personal injury.

The petitioner's recitation of the trial evidence is inaccurate. Among other things, the petitioner has cited to "evidence" which was specifically excluded by the district court and evidence which was excluded for the purpose for which it is cited. The petitioner has also failed to set forth other, important evidence and draws unsupported conclusions. Pursuant to United States Supreme Court Rule

15.1, this response will address the "misstatements of fact" set forth in the petition.

**A. The Michelin Tire and Its Intended Use.**

The Michelin tire involved in this case was a 16-inch light truck tire manufactured in June of 1985. [T. at 113, 410-12, 1089] A "16-inch" tire refers to one with a 16-inch diameter of the inner edge or "bead." [T. at 1092]

It is undisputed that the Michelin tire at issue was properly manufactured as designed. It is undisputed that the Michelin tire met or exceeded all federal regulatory requirements [T. at 1086-90, 1101-04], including Federal Motor Vehicle Safety Standard 119 ("Standard 119"), 49 C.F.R. § 571.119, which governs, among other things, tire sidewall markings, tire-rim matching information, endurance, strength, high speed performance, treadwear indicators, and mandatory testing. *Id.*

It is undisputed that the Michelin tire was entirely safe when used and handled as intended. The issues at trial focused only upon the suitability of the tire when it was unquestionably misused.

Like all tires, the Michelin tire in this case was designed to be used and handled in several specific ways:

**1. Matching Rim** — The Michelin tire was designed for use with a *matching* metal rim or wheel. The 16-inch tire in this case was designed to be used with a corresponding 16-inch rim.

Michelin provided a great deal of information apprising potential tire mounters of the size of its tire and the need for a matching rim. First, the tire contained on its sidewall the following statement:

MOUNT ONLY ON APPROVED 16-INCH RIMS

[Ptf. Ex. 23] This was an extra sidewall statement not required by federal regulations.

Second, Michelin complied with the comprehensive federal regulations governing the dissemination of information about tire-rim matching. Standard 119 specifically addresses "Tire and rim matching information" and grants to tire manufacturers the option of "ensur[ing] that a listing of the rims that may be used with each tire that he produces is provided to the public" by either (1) including the information in publications of at least one of several private industry groups, including the Tire and Rim Association (TRA), or (2) filing it with the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. §571.119.S51. There is no dispute that Michelin fully complied with the section S5 of Standard 119 by providing to the public through the TRA Yearbook all the information necessary for determining which rims matched which of its tires. [T. at 1080-86]

Third, Michelin complied with Standard 119's requirement of a sidewall marking of specific size, location, and depth, stating for the purposes of tire-rim matching the size of the tire. 49 C.F.R. §571.119.S6.5(c). The Michelin tire had embossed on its sidewall a sizemarking of "LT 235/85 R16," indicating its dimensions. "R16" means that the tire is a 16-inch radial tire. [T. at 1090-92; Pltf. Ex. 23][1]

Fourth, Michelin distributed the Michelin Passenger Light Truck Data Book. [T. at 735-38, 1097; Def. Ex. 14] The Data Book contains substantially the same information as the

[1] "LT" indicates that the tire is for use on light trucks. The notation "235/85" means that the tire sidewall-to-sidewall width is 235 millimeters and aspect ratio is 85% (the height of the tire is 85% of the width). [T. 1091] These markings are also required by Standard 119. 49 C.F.R. § 571.119.S6.5(c).

TRA Yearbook regarding which rims match this and other tires. [T. at 735-38, 1097; Def. Ex. 22]

Fifth, Michelin distributes and makes available to tire dealers and retailers (the people who typically mount tires) an additional package of literature published by the Rubber Manufacturer's Association (RMA) and OSHA.[2] [T. at 208-10, 225-26, 424, 1131-36] The package includes posters, leaflets, and other materials explaining in detail the proper methods for mounting tires. [T. at 1131-36; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20] Michelin helps to fund and provides technical data for inclusion in the RMA materials. [T. at 208-10, 225-56, 424, 1133-34] The materials *specifically warn* about the risks associated with mounting a tire on the wrong-sized rim. [T. at 209, 1132; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

Sixth, The Tire Guide, a yearly publication widely used and known in the industry, also contains the same tire-rim matching information. Like the RMA and OSHA material, The Tire Guide includes a specific warning about the risks of mismatching tires and rims which has appeared in every annual edition since 1976. [T. at 380, 384-85, 387, 390, 1094; Def. Ex. 24-26]

Seventh, to promote the proper training of tire mounters and users, Michelin maintains an instructional facility in Greenville, South Carolina. This facility is open to dealers, customers, and Michelin employees. [T. at 1174-75]

In short, to disseminate information about the size of its tires and which rims matched which tires, Michelin did far more than what the federal regulations state is "sufficient." 49 C.F.R. §571.119.S2. Moreover, Michelin disseminated tire-rim matching information through the TRA, an option specifically authorized by federal law. *Id.*, S5.1.

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[2] Because Driskell Farms is not subject to OSHA regulation, references to OSHA as the source of some of the materials was excluded at trial. [T. at 1121]

**2. Proper Pressurization** — The Michelin tire was designed to be inflated with air not exceeding a specified pressure. The maximum pressure for the tire at issue was 65 p.s.i. [T. at 730-34, 1143-44]

Federal regulations dictate precisely how tire manufacturers must indicate on their tires the maximum inflation pressure. Standard 119 sets forth the required wording, location of the marking (on the sidewall), size of the lettering, depth or height of the lettering, and number of markings. 49 C.F.R. §571.119.S6.5. There is no dispute that the Michelin tire in this case was in complete, verbatim compliance with the regulations. The tire was embossed with the notations, "Max. load single 2625 lbs. at 65 p.s.i. cold" and "Max. load dual 2330 lbs. at 65 p.s.i. cold."[3] [T. at 733-34; Pltf. Ex. 23]

In addition to the information on the tire sidewalls, the Data Book, the TRA Yearbook, and The Tire Guide also all state the maximum inflation pressure for the Michelin tire. [T. at 280-81; Def. Ex. 14, 22, 24-26] Moreover, the RMA and OSHA-printed materials distributed and made available by Michelin warn against overinflation. [Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

**3. Proper Mounting** — The tire was designed to be mounted on a metal rim by a properly-trained individual in accordance with correct mounting procedures. Untrained persons should not mount tires. Mounting tires is a process that requires specialized skill and equipment. [Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

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[3] The quoted language states the tire's maximum capacity. The tire's ability to support a load is directly dependent upon the pressure to which it is inflated.

Correct mounting first and foremost involves selecting a tire and rim of matching size. [T. at 1136] After the correctly-sized rim has been selected and the tire edges lubricated, the tire is fitted around the metal rim. This process is known as "buttoning." [T. at 1136-39; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

Because tire-wheel assemblies are subject to high inflation pressures, a tire should never be inflated unless it is buttoned to a rim which is *attached* to a mounting machine or vehicle, or unless the tire is *shielded*. [T. at 1144-47; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20] A mounter should *never* stand over a tire while inflating it or while monitoring the inflation pressure. Spring-loaded (clip-on) chucks should be used to attach the compressor hose to the tire valve so the mounter can stand back during inflation. Similarly, the inflation pressure should be monitored with an in-line pressure gauge — not a "pen"-type valve-stem gauge — so the mounter can continuously monitor the pressure and stand back. [T. at 1144-47; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

Shortly after inflation begins, a tire will "seat" itself against the flange of a matching rim. That is, the tire will "pop out" so that its inner beads are flush against the flange. Tires usually will "seat" at about 10-20 p.s.i. [T. at 1143]

It is undisputed that 40 p.s.i. is the *maximum* pressure that should be used in trying to "seat" a tire. If the tire has not seated at 40 p.s.i., the mounter should know that something is wrong and stop adding air. [Def. Ex. 6-11, 16, 18, 20, 24-26]

Only after the tire has been seated may it be pressurized up to either its operating or its maximum inflation level. [T. at 1143] The maximum pressure for the tire in this case, as noted before, was 65 p.s.i. [T. at 730-34, 1143-44]

**4. Use Without An Inner Tube** — The tire in this case was designed for use without an inner tube. An inner tube is unnecessary to maintain pressure since a proper tire/rim combination is airtight. [T. at 1066, 1123] In accordance with Standard 119, the tire contains on its sidewall the designation "tubeless." See 49 C.F.R. §571.119.S6.5(g). [T. at 1103-04; Pltf. Ex. 23]

**B. The Multiple Product Misuses and Their Consequences.**

It was undisputed that the tire in this case was misused in all of the following ways:

1. The 16-inch tire was mounted on a wrong-sized, 16 1/2-inch rim;
2. The tire was overinflated beyond the maximum seating pressure of 40 p.s.i. without the tire seating;
3. The tire was overinflated beyond its ultimate maximum capacity of 65 p.s.i.;
4. The tire was inflated while unrestrained without the use of a cage or shielding, without the use of a clip-on chuck or in-line pressure gauge, with the plaintiff standing over it; and
5. The tire was incorrectly mounted with an inner tube.

Having simultaneously violated all of these fundamental rules of tire mounting, Mr. Richards was injured when the mismatched and overinflated tire finally ruptured. [T. at 270-71, 274-75, 288, 296, 298, 316, 318, 343-46, 373-74]

It is undisputed that Mr. Richards would not have been injured but for the combination of multiple product misuses. According to the trial evidence, the Michelin tire will not burst unless it is both mismatched with a wrong-sized rim and overinflated. [T. at 846-49; Pltf. Ex. 36-37] And,

Mr. Richards would never have been injured had he followed any one of the other tenets of tire mounting. [T. at 1123-24, 1144-48]

### C. The Rarity of Mismatch Injuries.

Given the enormous number and different sizes of tires and rims sold, in circulation, mounted, and remounted every year in the United States, the possibility that a tire mounter might carelessly select the wrong rim was not unheard of to Michelin in 1985, when the subject tire was manufactured. Michelin has never disputed knowledge of the mismatch phenomenon.

Tire-rim mismatches, however, were quite rare. For example, of the multiple millions of 16-inch tires sold by Michelin for use in the United States, the evidence at trial showed only 4 mismatches involving Michelin tires. [T. at 153-54, 422-24, 1205-06][4] As the Eleventh Circuit correctly noted, the risk of a mismatch injury is on the order of one in millions. 21 F.3d at 1058. It is not, as petitioner claims, a rampant "national problem."

### D. The Petitioner's Design Defect Claim.

The petitioner claimed that Michelin's bead wire design[5] was defective, although no expert testified to this at trial. According to the plaintiff, Michelin was required to design its tire not just to withstand overinflation or mismatching, but mismatching and overinflation *together*.

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[4]The mismatch phenomena is so unusual that the DOT has declined to supplement Standard 119 to address it further. *See* 55 Fed. Reg. 32929 (Aug. 13, 1990); 56 Fed. Reg. 41815 (Aug. 23, 1991) ("there is little evidence of injuries or fatalities attributable to tire and rim mismatch . . . .").

[5]The bead wires are two hoop-shaped bundles of metal wire embedded in the inner edges of the tire that hold the inflated tire flush against the rim flange and anchor the various tire components.

Michelin proved that its "cable" bead wire design was viewed as being superior in the tire industry. [T. at 1047] According to Michelin's tire expert, increasing the strength of the bead wire to meet the petitioner's requirements is *not* necessarily desirable from the viewpoint of handling and overall safety. [T. at 1098-99] A tire that is mismatched and overinflated will sustain invisible damage to other critical components, notwithstanding that the bead wire may hold together. Such a damaged tire may fail suddenly during use, causing an accident. [T. at 1175-78] Preventing a bead wire failure during mounting (which will not cause injury if the tire/rim combination is properly secured or shielded) at the cost of running the risk of operational tire blowouts (which may very well cause injury) does nothing more than trade one risk for another, potentially greater risk.

Although the petitioner proved that it was "possible" to make a bead wire stronger, the petitioner never showed that doing so would create a tire of greater overall safety, as required by Alabama law. For example, the plaintiff did not call a single tire expert to testify that Michelin's bead wire design was defective, what an alternative design should have been, or how an alternative design would have improved the tire's overall safety. As the Eleventh Circuit correctly pointed out, none of the evidence cited by the petitioner addressed the question of overall safety. To the contrary, the evidence merely addressed the preliminary issue of whether it was feasible to build any alternative design, safer or not. 21 F.3d at 1056-57 n. at 17.[6] In the complete absence of any evidence

[6] On the subject of alternative designs, the petitioner cites to nonexistent evidence. At page 7 of the Petition, the petitioner alludes to a supposed design for a bead wire which could withstand inflated pressures in excess of 200 psi even when mismatched. However, this evidence was excluded for the purpose of showing a safer, alternative design. [T. at 790-93] Similarly, the "evidence" cited by the petitioner at page 8, n.8 that Goodyear was supposedly using alternative feasible technology was also specifically excluded. [Pretrial T. at 68-70; T. at 447-51, 677-78, 744-47]

showing that an alternative design would be of greater safety than the design at issue, the Eleventh Circuit correctly concluded that the elements of a design defect claim had not been proved.

**E. The Petitioner's Warning Claim.**

The petitioner also claimed that the reason for Mr. Richards' injury was not his multiple violations of basic tire mounting rules, but was instead Michelin's failure to put a warning on the tire sidewall more detailed than the statement which already existed, "MOUNT ONLY ON APPROVED 16-INCH RIMS." The petitioner said that Michelin should have embossed on its sidewall a picture and a special 42-word warning about tire-rim mismatches. [Def. Ex. 125]

To support this claim, the petitioner first pointed out that in 1982, Ford Motor Company wrote to its tire suppliers, including Michelin, and asked that a sidewall warning addressing tire-rim mismatches be placed on the tires it bought. [T. at 158-61; Pltf. Ex. 39A-L] The Michelin Product Safety Group, however, had always concluded that a tire sidewall warning is not a practical or effective way to communicate to tire mounters and users all the detailed information necessary to adequately teach proper tire handling and use. [T. at 1105] Accordingly, before Ford's request, neither Michelin nor any other tire manufacturer ever singled out the relatively rare hazard of tire-rim mismatches and placed on its tire sidewalls a special warning addressing it. Instead, Michelin and other manufacturers continued to rely upon the proper training of potential tire mounters and the extensive dissemination of tire-rim matching information by other methods, discussed above.

In response to Ford's 1982 request, Michelin advised Ford that, based on its experience and other factors, the tire itself was not an effective way of communicating with potential tire mounters. [T. at 166-67, 228; Pltf. Ex. 39A-L] However, because Ford insisted that some language be placed on the tires as a condition of sale, Michelin agreed to mold onto its tire sidewalls the statement, "MOUNT ONLY ON APPROVED 16-INCH RIMS." [T. at 194-95, 202, 228-35, 237-38, 246]

Ford agreed that Michelin's warning was entirely satisfactory and specifically *approved* Michelin's response to its request. [T. at 167-70, 798] The petitioner's implication that Ford's approval was reluctant or qualified is simply not supported by the record.

In addition to relying upon the Ford matter, the petitioner called a single "expert" in the field of "ergonomics" or "human factors" to take issue with Michelin's position that, as of 1985, on-tire warnings were not the best way to communicate with potential tire mounters. This witness, however, conceded that Michelin could reasonably have concluded in 1985 that tire sidewall warnings did not improve product safety, and admitted that he could not conclude that Michelin should have had any warning addressing mismatches on its tire sidewalls in the first place. [T. at 551-54, 577-78, 581, 608-09][7] Far from proving wrongdoing, his testimony actually supported Michelin's position.

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[7] As the Eleventh Circuit noted, this witness "conceded that at the time the tire was manufactured, there was evidence that on-product warnings did not contribute to product safety." 21 F.3d at 1058 n.20.

The petitioner did not call a single expert or lay witness in the tire industry who testified that a sidewall warning was necessary or, independent of Ford's request (with which Michelin complied), customary. There was no evidence at trial that any tire manufacturer ever placed a mismatch warning on its tire sidewalls for any reason other than Ford's unique request. There was no evidence at trial that any other tire purchaser, any tire manufacturer, any industry group, or any governmental entity ever requested or recommended that a mismatch warning be molded on to tire sidewalls.

## SUMMARY OF THE ARGUMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was correct, and this case meets none of the criteria of Supreme Court Rule 10.1 for granting a writ of certiorari. There is no "special and important reason" why this Court should duplicate the Eleventh Circuit's comprehensive review of a voluminous record merely to reach the same conclusions about the insufficiency of the petitioner's trial evidence.

As for the design defect claim, the Eleventh Circuit correctly quoted and applied the two-prong test articulated by the Alabama Supreme Court in *Beech v. Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991). 21 F.3d at 1056. The second prong requires proof that "the utility of the alternative design outweighed the utility of the design actually used." *Beech*, 584 So.2d at 450 (emphasis added). The petitioner is simply incorrect in claiming that this requirement is nonexistent.

No trial evidence addressed this requirement of proof of "greater overall safety." The petitioner's only evidence addressed the first prong — whether a feasible alternative design existed, regardless of its safety. The petitioner presented no evidence that any proposed alternative design

would result in a tire of greater safety, considering all applications. Michelin's evidence that its tire design was viewed as superior in the industry and that adopting the alternative design urged by the petitioner would unduly compromise the tire's operational safety was undisputed. For these reasons, the Eleventh Circuit correctly held the petitioner's evidence insufficient to establish a design defect. 21 F.3d at 1056-57.

The Eleventh Circuit applied the correct strict Alabama standard for awarding punitive damages. As the Eleventh Circuit explicitly stated, under Alabama law a defendant may be liable for punitive damages only upon proof that it, "with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty with *knowledge* of the existing conditions and that this act or omission would likely or probably lead to the plaintiff's injury." 21 F.3d at 1057 (emphasis in original). That is the correct standard.

The trial evidence was insufficient to establish intentional, malicious, or wanton misconduct on Michelin's part. With respect to the design defect claim, as set forth above, the petitioner failed even to prove one of its necessary elements, let alone the heightened degree of culpability necessary to sustain an award of punitive damages. 21 F.3d at 1058.

The evidence on the petitioner's warning claim was similarly insufficient to establish wantonness. The Michelin tire at issue was in complete compliance with federal regulations, including those dictating the proper dissemination of "tire and rim matching information" and "tire sidewall markings." 49 C.F.R. § 571.119. The evidence showed extensive efforts by Michelin to educate tire mounters about proper tire handling and use by way of a special warning on the tire sidewall, sidewall markings of the tire size and maximum inflation pressure, the publication of information about

tire-rim matching in private industry booklets, the distribution of literature with the tire, and contributing to the ready availability in the tire industry of information about tire-rim matching.

No expert testified that Michelin's tire markings failed to comply with regulatory requirements. Moreover, the petitioner offered a "warnings" expert, who conceded that reasonable people could disagree whether a tire sidewall warning addressing tire-rim mismatches was necessary.

The trial evidence showed that Michelin complied with Ford Motor Company's request that some language be molded on the tire sidewalls addressing tire-rim mismatches. No other private or public entity ever requested or demanded a similar tire sidewall warning, and no other tire manufacturer ever placed such a warning on its tire sidewall for any reason other than Ford's unique request (with which Michelin complied).

Michelin's evidence that tire-rim mismatch injuries are extraordinarily rare (on the order of one in millions) was uncontradicted at trial. And, no evidence whatsoever showed that Michelin knew that the reason for the isolated mismatch injuries was the lack of a more specific and detailed tire sidewall marking.

For these reasons, the Eleventh Circuit correctly held that no evidence existed establishing Michelin's *knowledge* that the lack of a more detailed sidewall warning made mismatch injuries *likely*. The trial evidence, therefore, was insufficient to sustain an award of punitive damages.

## REASONS FOR DENYING THE WRIT

### I. The Eleventh Circuit Correctly Found the Trial Evidence Insufficient on the Petitioner's Design Defect Claim

#### A. The Eleventh Circuit Applied the Correct Standard.

Contrary to the petitioner's assertion, the Eleventh Circuit correctly applied the two-prong test articulated by the Alabama Supreme Court in *Beech v. Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991), for design defect cases. The Eleventh Circuit quoted the pertinent language of the *Beech* decision and plainly set forth the two prongs. 21 F.3d at 1056. The second prong requires proof that "the utility of the alternative design outweighed the utility of the design actually used." *Beech*, 584 So.2d at 450 (emphasis added).[8] That is the requirement of proof of "greater overall safety." 21 F.3d at 1056.

#### B. No Evidence Existed Addressing the Issue of Greater Overall Safety.

Although the petitioner's evidence arguably addressed the first prong (the existence of a feasible design which would have prevented the injuries in question), no evidence whatsoever addressed the second prong. As set forth above, the "evidence" cited by the petitioner in his certiorari application relating to Goodyear tires was specifically excluded on this issue. [Pretrial T. at 68-70, T. at 447-51, 677-78, 744-47] And, the reference to a Michelin alternative design simply

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[8] When addressing *Beech*, the petitioner omits the word "outweighed" in quoting the second prong, thus enabling the petitioner to assert (incorrectly) that *Beech* merely requires juries to "weigh" the relative utilities. Petition at 23. To the contrary, *Beech* establishes the need for some evidence showing that the utility of the proposed alternative design "*out*weighs" that of the original design. *Beech*, 584 So.2d at 450.

referred to an alternative bead wire technology; no evidence showed that employing this technology in the tire at issue would have resulted in a tire of greater safety, considering all applications. For these reasons, the Eleventh Circuit correctly held the petitioner's evidence insufficient to establish a design defect. 21 F.3d at 1056-57.

## II. The Eleventh Circuit Correctly Found the Trial Evidence Insufficient to Establish Intentional, Malicious, or Wanton Misconduct

### A. The Eleventh Circuit Applied the Correct Standard.

The Eleventh Circuit did not, as the petitioner charges, "substitute [its] own philosophical preferences" or "ignore controlling law" in order to reach a "result-driven" decision. Petition at 15, 13, 22 n.16. To the contrary, the Eleventh Circuit quoted and applied the correct Alabama standard for awards of punitive damages and cited controlling Alabama authorities:

> To be guilty of wantonness, the plaintiff must show that a defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty with knowledge of the existing conditions and that this act or omission would likely or probably lead to the plaintiff's injury. . . . Wantonness requires "knowledge that an act or failure to act does not merely increase the risk of injury, but that the act makes injury 'likely' or 'probable'."

21 F.3d at 1057 (emphasis in original) (various citations omitted) (quoting *Toole v. McClintock*, 999 F.2d 1430, 1435 (11th Cir. 1993)). This is the same standard which the petitioner cites. Petition at 20.

The petitioner has simply claimed, disingenuously, that the Eleventh Circuit's analysis of certain specific evidence was its sole legal standard. For example, the Eleventh Circuit properly considered the extraordinary statistical rarity of mismatch injuries as a factor in evaluating whether Michelin ignored an intolerable, pervasive problem. The petitioner twists this to say that the Eleventh Circuit substituted a "statistical probability" test for the correct wantonness standard the Eleventh Circuit itself cited. Petition at 19-22. Similarly, the Eleventh Circuit correctly considered Michelin's extensive efforts to disseminate information about tire-rim matching by several methods, including the tire sidewall. The petitioner stretches this to say that the Eleventh Circuit actually employed yet another standard, a "taking some steps to warn" rule. Petition at 16-19. Needless to say, it was entirely appropriate (and, indeed, incumbent upon) the Eleventh Circuit to analyze the trial evidence. The petitioner's claim that, by doing so, the Court substituted two different legal standards for the law the Eleventh Circuit itself recited is unjustified.

## B. The Trial Evidence was Insufficient to Establish Intentional, Malicious, or Wanton Misconduct.

The evidence of design defect was wholly insufficient to establish intentional, malicious, or wanton misconduct on Michelin's part. As set forth above, the petitioner failed even to prove the elements of a design defect claim, let alone the heightened degree of culpability necessary to sustain an award of punitive damages. This was the appropriate analysis of the Eleventh Circuit. 21 F.3d at 1058.

The Eleventh Circuit also correctly analyzed the evidence on the petitioner's warning claim. That analysis was entirely consistent with Alabama law and with federal authorities interpreting Alabama law.

The petitioner first argues that, simply because four other mismatch claims existed (out of multiple millions of Michelin tires mounted and remounted), the evidence was automatically sufficient to establish wantonness. The Alabama courts have never held that any evidence of a prior claim automatically creates the potential for punitive exposure. To the contrary, logic and precedent dictate that evidence of prior notice may or may not be sufficient evidence of wantonness, depending on circumstances such as what the notice is, what the defendant knew about the cause of the prior incidents, and the rarity of the prior incidents. *Compare, e.g., Benford v. Richards Medical Co.*, 792 F.2d 1537 (11th Cir. 1986) (notice insufficient to prove wantonness) with *Brown v. Turner*, 497 So.2d 1119 (Ala. 1986) (notice sufficient). As correctly pointed out by the Eleventh Circuit, Alabama law requires proof that the defendant knew that its failure to do some act would likely result in injury. *Salter v. Westra*, 904 F.2d 1517, 1525 (11th Cir. 1990); *accord Grave v. Wildsmith*, 177 So.2d 448, 452 (Ala. 1965). Here, no evidence whatsoever showed that Michelin knew that the rare mismatch injuries were caused by the lack of a more detailed sidewall warning. And, the evidence plainly showed the extraordinary rarity of mismatch injuries, on the order of one in millions, which hardly rises to the level of "likelihood."

Moreover, the record was replete with evidence establishing Michelin's good faith. As set forth previously, the Michelin tire at issue was in complete compliance with Standard 119, including that regulation's dictates regarding "tire and rim matching information" and "tire sidewall markings." The evidence showed Michelin's extensive efforts to educate tire mounters about proper tire handling and use. Moreover, the tire at issue had embossed on its sidewall a specific warning addressed to the exact subject matter of this

case: "MOUNT ONLY ON APPROVED 16-INCH RIMS." And, the evidence showed extraordinary product misuse on a nearly unprecedented scale.

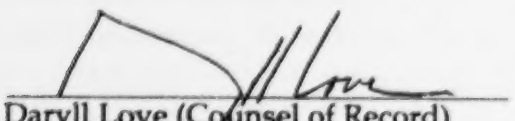
The petitioner wrongly exalts the decision in *Sears Roebuck & Co. v. Harris*, 630 So.2d 1018 (Ala. 1993). As the Eleventh Circuit correctly pointed out, this decision is "easily distinguishable" on its facts. 21 F.3d at 1059 n.23. *Sears* involved all of the following additional evidence, none of which was present in this case: (1) expert testimony that the defendant violated a published industry standard, (2) the complete lack of any permanent on-product warning addressing the danger at issue, and (3) a product specifically designed for installing by an untrained consumer (as opposed to a trained tire mounter). In addition, Sears did not involve any evidence of compliance with specific governmental regulations addressing the danger at issue, did not involve effort in excess of those stated to be "sufficient" by governmental rules, and did not involve any evidence of the extraordinary rarity of injuries resulting from the alleged danger.

For these reasons, the Eleventh Circuit correctly held that the trial evidence was insufficient to establish intentional, malicious, or wanton misconduct on Michelin's part.

## CONCLUSION

For the reasons set forth above, this case meets none of the criteria of Supreme Court Rule 10.1 for granting writs of certiorari. There is no "special and important reason" for this Court to duplicate the task of reviewing the voluminous record in this case merely to reach the same conclusions as the Eleventh Circuit. The petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all interested parties to this action with a copy of Respondent's Brief in Opposition by depositing a copy of same in the United States Mail, in a properly addressed envelope with adequate postage affixed thereon to:

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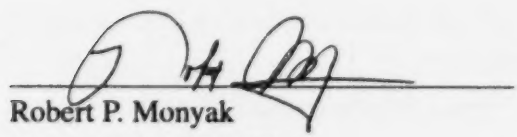
This 15th day of December, 1994.



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## APPENDIX

§ 571.119 Standard No. 119; New pneumatic tires for vehicles other than passenger cars.

S1. Scope. This standard establishes performance and marking requirements for tires for use on multipurpose, passenger vehicles, trucks, buses, trailers, and motorcycles.

S2. Purpose. The purpose of this standard is to provide safe operational performance levels for tires used on motor vehicles other than passenger cars, and to place sufficient information on the tires to permit their proper selection and use.

S3. Application. This standard applies to new pneumatic tires designed for highway use on multipurpose passenger vehicles, trucks, buses, trailers, and motorcycles manufactured after 1948.

S4. Definitions. All terms defined in the Act and the rules and standards issued under its authority are used as defined therein.

"Light truck tire" means a tire designated by its manufacturer as primarily intended for use on lightweight trucks or multipurpose passenger vehicles.

"Model rim assembly" means a test device that (a) includes a rim which confirms to the published dimensions of a commercially available rim, (b) includes an air valve assembly when used for testing tubeless tires or an innertube and flap (as required) when used for testing tubetype tires, and (c) undergoes no permanent rim deformation and allows no loss of air through the portion that it comprises of the tire-rim pressure chamber when a tire is properly mounted on the assembly and subjected to the requirements of this standard.

S5. Tire and rim matching information.

S5.1 Each manufacturer of tires shall ensure that a listing of the rims that may be used with each tire that he produces is provided to the public. For purposes of this section each rim listing shall include dimensional specifications and a diagram of the rim. However a listing compiled in accordance with paragraph (a) of this section need not include dimensional specifications or a diagram of a rim if the rim's dimensional specifications and diagram are contained in each listing published in accordance with paragraph (b) of this standard. The listing shall be in one of the following forms:

(a) Listed by manufacturer name or brand name in a document furnished to dealers of the manufacturer's tires to any person upon request and in duplicate to: Tire Division, National Highway Safety Administration, 400 Seventh Street, S.W., Washington, D.C., 20590; or

(b) Contained in publications, current at the date of manufacture of the tire or any later date, of at least one of the following organizations:

The Tire and Rim Association

The European Tyre and Rim Technical Organization

Japan Automobile Tire Manufacturer's Association, Inc.

Deutche Industrie Norm

British Standards Institution

Scandanavian Tire and Rim Organization

S5.2 Information contained in a publication specified in S5.1(b) which lists general categories of tires and rims by size designation, type of construction, and/or intended use, shall be considered to be manufacturer's information pursuant to S5.1 for the listed tires, unless the publication itself or specific information provided according to S5.1(a) indicates otherwise.

S6. Requirements. Each tire shall be capable of meeting any of the applicable requirements set forth below, when mounted on a model rim assembly corresponding to any rim designated by the tire manufacturer for use with the tire in accordance with S5. However, a particular tire need not meet further requirements after having been subjected to and met the endurance test (S6.1), strength test (S6.2), or high speed performance test (S6.3).

S6.1 Endurance.

S6.1.1 Prior to testing in accordance with the procedures of S7.2, a tire shall exhibit no visual evidence or tread, sidewall, ply, cord, innerliner, or bead separation, chunking, broken cords, cracking, or open splices.

S6.1.2 When tested in accordance with tire procedures of S7.2:

(a) There shall be no visual evidence of tread, sidewall, ply, cord, innerliner, or bead separation, chunking, broken cords, cracking, or open splices.

(b) The tire pressure at the end of the test shall be not less than the initial pressure specified in S7.2(a).

S6.2 Strength. When tested in accordance with the procedures of S7.3, a tire's average breaking energy value shall be not less than the tire specified in Table II for that tire's size

and load range.

S6.3 High speed performance. When tested in accordance with the procedures of S7.4, a tire shall meet the requirements set forth in S6.1.1 and S6.1.2(a) and (b). However, this requirement applies only to motorcycle tires and to non-speed-restricted tires of 14.5-in nominal rim diameter or less marked load range A, B, C, or D.

S6.4 Treadwear indicators. Except as specified below, each tire shall have at least six treadwear indicators spaced approximately equally around the circumference of the tire that enable a person inspecting the tire to determine visually whether the tire has worn to a tread depth of one-sixteenth of an inch. Tires with 12-inch or smaller rim diameter shall have at least three such indicators which permit visual determination that the tire has worn to a tread depth of one-thirty-second of an inch.

S6.5 Tire markings. Except as specified below, each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section. The markings shall be placed between the maximum section width (exclusive of sidewall decorations or curb ribs) and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area which is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, the markings shall appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings shall be in letters and numerals not less than 0.078 inch high and raised above or sunk below the tire surface not less than 0.015 inch, except that the marking depth shall be not less than 0.010 inch in the case of motorcycle tires. The tire identification and the DOT

symbol labeling shall comply with Part 574 of this chapter. Markings may appear on only one sidewall and the entire sidewall area may be used in the case of motorcycle tires and recreational, oat, baggage, and special trailer tires.

(a) The symbol DOT, which shall constitute a certification that the tire conforms to applicable Federal motor vehicle safety standards. This symbol may be marked on only one sidewall.

(b) The tire identification number required by Part 574 of this chapter. This number may be marked on only one sidewall.

(c) The tire size designation as listed in the documents and publications designated in S5.1.

(d) The maximum load rating and corresponding inflation pressure of the tire, shown as follows:

(Mark on tires rated for single and dual load):

Max load single — lbs. at — psi cold.

Max load dual — lbs. at — psi cold.

(Mark on tires rated only for single load:)

Max load — lbs. at — psi cold.

(e) The speed restriction of the tire, if 55 mi/h or less, shown as follows:

Max speed — mph.

(f) The actual number of piles and the composition of the ply cord material in the sidewall, aid, if different, in the tread area.

(g) The words "tubeless" or "tube type" as applicable.

(h) The word "regroovable" if the tire is designed for

regrooving.

(i) The word "radial" if a radial tire.

(j) The letter designating the tire load range.

S6.6 Maximum load rating. If the maximum load rating for a particular tire size is shown in one or more of the publications described in S5.1(b), each tire of that size designation shall have a maximum load rating that is not less than the published maximum load rating, or if there are differing published ratings for the same tire size designation, not less than the lowest published maximum load rating for the size designation.

S7. Test procedures.

S7.1 General conditions.

S7.1.1 The tests are performed using an appropriate new tube, tube valve and flap assembly (as required 0 that allows no loss of air for testing of tube-type tires under S7.2, S7.3, and S7.4, and tubeless tires under S7.3.

S7.1.2 The tire must be capable of meeting the requirements of S7.2 and S7.4 when conditioned to a temperature of 95° F for 3 hours before the test is conduced, and with an ambient temperature maintained at 95° F during all phases of testing. The tire must be capable of meeting the requirements of S7.3 when conditioned at a temperature of 70° F for 3 hours before the test is conducted.

S7.2 Endurance. (a) Mount the tire on a model rim assembly and inflate it to the inflation pressure, corresponding to the maximum load rating marked on the time. Use single maximum load value when the tire is marked with both single and dual maximum load.

(b) After conditioning the tire-rim assembly in accordance with S7.1.2, adjust the tire pressure to that specified in (a) immediately before mounting the tire rim assembly.

(c) Mount the tire-rim assembly on an axle and press it against a flat faced steel test wheel that is 67.23 inches in diameter and at least as wide as the tread of the tire.

(d) Apply the test load and rotate the test wheel as indicated in Table III for the type of tire tested conducting each successive phase of the test without interruption.

(e) Immediately after running the tire the required time, measure the tire inflation pressure. Remove the tire from the model rim assembly, and inspect the tire.

S7.3 Strength. (a) Mount the tire on a model rim assembly and inflate it to the pressure corresponding to the maximum load, or maximum dual load where there is both a single and dual load marked on the tire. The tire is tubeless, a tube may be inserted to prevent loss of air during the test in the event of puncture.

(b) After conditioning the tire-rim assembly in accordance with S7.1.2, adjust the tire pressure to that specified in (a).

(c) Force a cylindrical steel plunger, with a hemispherical end and of the diameter specified in Table I for the tire size, perpendicularly into a raised tread element as near as possible to the centerline of the tread, at a rate of 2 inches per minute, until the tire breaks or the plunger is stopped by the rim.

(d) Record the force and the distance of penetration just before the tire breaks, or if it fails to break, just before the plunger is stopped by the rim.

(e) Repeat the plunger application at 72° intervals around the circumference of the tire, until five measurements are made. However, in the case of tires of 12-in rim diameter or less, repeat the plunger application at 120° intervals around the circumference of the tire, until three measurements are made.

(f) Compute the breaking energy for each test point by the following formula:

$W=(FP/2)$

where:

W = Breaking energy.

F = Force in pounds, and

P = Penetration in inches.

(g) Determine the average breaking energy value for the tire by computing the average of the values obtained in accordance with paragraph (f).

S7.4 High speed performance. (a) Perform steps (a) through (c) of S7.2.

(b) Apply a force of 88 percent of the maximum load rating marked on the tire (use single maximum load value when the tire is marked with both single and dual maximum loads), and rotate the test wheel at 250 rpm for 2 hours.

(c) Remove the load, allow the tire to cool to 95° F., and then adjust the pressure to that marked on the tire for single tire use.

(d) Reapply the same load, and without interruption or readjustment of inflation pressure, rotate the test wheel at 375 rpm for 30 minutes, then at 400 rpm for 30 minutes, and then at 425 rpm for 30 minutes.

(e) Immediately after running the tire the required time, measure the tire inflation pressure. Remove the tire from the model rim assembly, and inspect the tire.